



Tsilhqot'in Nation v. British Columbia 2014 SCC 44

Background

This case is the first and, so far, only instance of a court in Canada granting aboriginal title.¹ The legal significance of this case is that it lays out clearly what the test is that a First Nation must meet to gain title to their land.

The Tsilhqot'in Nation in British Columbia has had a difficult history with the Provincial Government since 1983, when BC granted logging licenses on their traditional territory. The Tsilhqot'in Band attempted to negotiate with the Province and gain title to their land, but these talks failed. As a result, the Tsilhqot'in Band, on behalf of the entire Tsilhqot'in Nation, went to court to claim title to their asserted traditional territory.

Legal Issue

The primary legal issue in this case is what does the First Nation need to prove in order to be granted title to their land. Previously, the Supreme Court of Canada in *Delgamuukw v British Columbia* stated that in order to gain title, a First Nation must show three things:

1. Sufficient occupation of the land
2. Continuous occupation of the land
3. Exclusive occupation of the land

This case expands on these factors and explains what each requires.

The Law

The court addresses each of the three factors individually and then applies the evidence in the case to each one in order to determine whether the Tsilhqot'in have title to their land.

1. Sufficient occupation of the Land

Sufficient occupation means that the First Nation must show that they historically acted in a way that would communicate to other groups (e.g. other First Nations or European settlers), that they held the land for their own uses. There must be strong evidence of a presence on the land, but what this evidence looks like will vary based on the First

¹ Aboriginal title can generally be described as ownership of traditional lands by a First Nation. It is very similar to the way in which one generally owns property in Canada, but with some key differences, such as, the land is held in common by the First Nations people, there are limitations on how it can be used (particularly with environmental impacts), and it cannot be sold to anyone except the Government. In BC, most First Nations do not have aboriginal title to their land, and the ones that do negotiated for their land through treaties. This case is only instance of a court granting aboriginal title.

Nation. For example, farming and permanent settlements may be sufficient evidence, but they are not required. A nomadic First Nation also may demonstrate that they sufficiently used the land within the context of their way of life.

2. Continuous Occupation of the Land

Continuous occupation does not mean "an unbroken chain of continuity", but rather means that the present occupation is on the same land as the First Nation would have occupied prior to the existence of Canada. If, for some reason, a First Nation at some point since Canada came into being had to leave their land (perhaps due to disease or famine) and then came back, this would not harm their claim to title.

3. Exclusive Occupation of the Land

Exclusive occupation means that the First Nation had the intention and capacity to control the land exclusively. They must have been able to prevent other First Nations from using the land. If other groups were on the land, it does not necessarily mean the land was not controlled exclusively, especially if the First Nation granted permission to other groups to be on the land.

In applying each of the factors to the evidence submitted by the Tsilhqot'in, the court found that they met the test for establishing aboriginal title and granted title to the First Nation over their claimed land.

Conclusion

In order to establish aboriginal title a First Nation must prove to the court that they had sufficient, continuous, and exclusive occupation of their asserted territory. If these are proven a court can grant title to the land, however, courts have noted that it is preferable for a First Nation to gain title to their land through a process of treaty negotiation.

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